HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARK ELMORE, Plaintiff, v. STEPHEN D. SINCLAIR, Defendant.	CASE NO. C08-53 RBL ORDER

THIS MATTER comes on before the above-entitled Court upon Petitioner's Motion for an Evidentiary Hearing [Dkt. #45]. Having considered the entirety of the records and file herein, and having heard the argument of the parties, the Court finds and rules as follows:

I. FACTS AND PROCEDURAL HISTORY[1]

On April 17, 1995, Clark Elmore committed a heinous crime. Elmore raped and brutally murdered Kristy, the 14 year old daughter of his then girlfriend, Sue Ohnstad. After ordering Kristy to the back of his van and forcibly removing her clothing, Elmore raped Kristy as she continued begging him not to. He then took the belt from her pants and strangled her. Not convinced that Kristy was dead, he drove a needle-like object through her left ear five and a half

[1] This recitation is not intended to be comprehensive.

inches into her brain until it touched the skull on the other side. Still not certain she was dead, Elmore placed a garbage bag over Kristy's head and struck her several times with a sledgehammer. Kristy's partially nude body was found four days later near the South end of Lake Samish in Whatcom County. She was laying face down on the ground covered by a tarp with the plastic bag still over her head.

On the evening of April 23, 1995, Elmore turned himself into Bellingham Police. He was interviewed by Bellingham Police Detective Les Gitts and gave a taped confession.

Elmore appeared the next day before a Whatcom County Court Commissioner who found probable cause to detain him and charge him with murder in the first degree. Jon Komorowski of the Whatcom County Public Defenders' Office was thereafter appointed to represent Elmore. He was subsequently charged with aggravated murder in the first degree and two counts of rape in the second degree. The state filed notice of their intent to seek the death penalty. On June 29 and July 6, 1995, respectively, Elmore entered guilty pleas to aggravated murder in the first degree and to one count of rape in the second degree.

On February 20, 1996, jury selection began. Over approximately four and a half days between March 6 and March 12, 1996, the state conducted a special sentencing proceeding to determine whether Elmore would be sentenced to death or to life in prison without the possibility of parole. The defense's case-in-chief consisted of the testimony of the Court Commissioner who handled Elmore's first appearance, the Superior Court Judge who handled the arraignment, the Superior Court Judge who presided over a motion hearing and who took Elmore's guilty plea, the defense investigator, and a law school professor. The judges generally testified to Elmore's subdued demeanor during their interactions with him, and to his attempt to plead guilty at his initial appearance. The defense investigator presented Elmore's personal history, and the

professor opined that none of Elmore's previous crimes were "strikes" under Washington's "3 strikes" sentencing provision. Elmore did not testify nor allocute. The defense of Elmore's life covers just seventy-seven pages of transcript and took less than one hour. After deliberating less than four hours, the jury returned a sentence of death on March 12, 1996.

Elmore's sentence of death was affirmed on direct appeal to the Washington State Supreme Court on October 7, 1999. The United States Supreme Court denied certiorari on October 2, 2000. After obtaining a stay of execution shortly thereafter, Elmore filed his Personal Restraint Petition (PRP) on June 29, 2001. His current counsel was appointed to represent Elmore in his PRP, and moved the Washington State Supreme Court for a reference hearing. The Supreme Court granted the request for a reference hearing, but limited the issue to be addressed to whether counsel's failure to consult and call mental health experts in the penalty phase was deficient. Petitioner sought to expand the hearing to include all of the allegations of ineffective assistance of counsel and disputed factual issues regarding juror misconduct. This request was denied.

On June 7-10, 2004, Superior Court Judge Michael E. Rickert conducted the hearing. Judge Rickert issued Findings of Fact on September 10, 2004. On November 21, 2007 the Supreme Court denied Elmore's PRP. Elmore thereafter filed a Petition for a Writ of Habeas Corpus in this Court.

Elmore's First Amended Petition for Writ of Habeas Corpus contained 15 claims for relief. By way of the motion now before the Court, he seeks an evidentiary hearing on six of those claims "to present live witnesses to testify to the facts they previously swore to in written declarations." [Petitioner's Supplemental Memorandum Regarding Application of *Pinholster*, Dkt.62, p. 1]. The claims are:

Claim 3: Guilty plea ineffective assistance of counsel

Claim 4: Juror misconduct

Claims 7 and 8: Penalty phase ineffective assistance of counsel

Claim 10: Redaction of audiotape

Claim 13: Cumulative ineffective assistance of counsel

[Dkt. 62, p. 11]. Elmore may also still be seeking an evidentiary hearing on Claims 5 and 6 (concerning the shackling of the defendant) and on Claim 9 (regarding trial counsel's failure to object to the prosecutor's dangerousness argument). [Motion for Evidentiary Hearing, Dkt. 45, pp. 39-45].

II. DISCUSSION

A. Standard for an Evidentiary Hearing.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a petitioner is not entitled to federal habeas relief unless he can demonstrate that the state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). The state court's factual findings "shall be presumed to be correct" unless the petitioner rebuts this presumption with "clear and convincing evidence." § 2254(e)(1)[2]; *see also id.*, at 473-474.

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[2]Title 28, United States Code Section 2254(d) and (e) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -

The *Landrigan* Court provided the following directives to district courts:

> In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.
>
> It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.

Id. (internal citations and footnote omitted).

To that end, the Supreme Court has recently held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. _____, 131 S. Ct. 1388, 1398 (2011). By its terms, review under

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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that - -
>
> (A) the claim relies on - -
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

§ 2254(d)(2) is also limited to the record before the state court. *See id*., at 1400, n. 7; *see also id*., at 1415 (Sotomayor, J., dissenting). To "determin[e] whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Harrington v. Richter*, 562 U.S. _____, 131 S. Ct. 770, 784 (2011). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any state-law procedural principles to the contrary." *Id*.

Therefore, this Court cannot hold an evidentiary hearing and use facts found at that hearing to rule that the state court's decision violated either § 2254(d)(1) or (d)(2). As explained by Justice Breyer, a federal habeas court may hold an evidentiary hearing under § 2254(e) if it first "finds that the state-court decision fails (d)'s test (or if (d) does not apply.") *Pinholster*, 131 S. Ct. at 1412 (Breyer, J., concurring in part and dissenting in part).

To fail § 2254(d)'s test, the habeas court must conclude that the state-court decision was not merely incorrect or erroneous, it must also be unreasonable. *Terry Williams v. Taylor*, 529 U.S. 362, 411 (2000) (O'Connor, J., concurring); *Landrigan*, 550 U.S. at 473. Section 2254(d) does not apply if a claim was not "adjudicated on the merits in state court proceedings." *Pinholster*, 131 S. Ct. at 1401 (referencing *Michael Williams v. Taylor*, 529 U.S. 420, 427-429 (2000)).

B. An Evidentiary Hearing in This Case Is Foreclosed By Supreme Court Case Law.

Elmore argues that he was "not provided a full and fair hearing in state court on claims which are clearly colorable" and argues that the "extraordinarily narrow" hearing that he did have "fail[ed] to resolve any of the disputed facts." [Motion, Dkt. #45, pp. 1-2.] He seeks the hearing not to develop new facts, but to "fully prove what he alleged in state court" and "so that

disputed facts can for the first time be properly resolved – with this Court evaluating live testimony, rather than simply relying on a paper record." [*Id*., *see also* Pet. *Pinholster* Brief, Dkt. #62, p. 1, "he seeks an evidentiary hearing to present live witnesses to testify to the facts they previously swore to in written declarations."] Elmore argues that he diligently attempted to develop his claims in state court, but the state court's failure to allow an evidentiary hearing on all the claims he requested denied him the opportunity to develop the factual basis of his claims. He relies on *Michael Williams v. Taylor* for this proposition. [Pet. *Pinholster* Brief, Dkt. #62, pp. 10-11.]

In *Michael Williams* the petitioner sought an evidentiary hearing in federal court on three claims he had not presented to the state court. The state argued that an evidentiary hearing was precluded by § 2254(e)(2) because he "failed to develop the factual basis of the claim" in the state court. The Supreme Court held that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Michael Williams*, 529 U.S. at 432. The Court found that the petitioner was entitled to an evidentiary hearing on two of his claims, in part because he sought at the state level funds for an investigator to investigate the empanelling of the jury and because the fault, if anyone's, was with the juror and prosecutor who remained silent during questioning. *Id*., at 442-43.

Unlike *Michael Williams*, Elmore is not asserting claims that were not before the Washington Supreme Court. All the claims he presents here were asserted in his PRP. He presented his own and trial counsel's declarations, declarations from legal and medical experts, and from family and friends. He submitted the deposition of Juror 12. The state court also conducted a four-day reference hearing on his claim that trial counsel failed to consult and call

mental health experts in the penalty phase. He argues now that because the state court did not conduct an evidentiary hearing on all of his claims, the claims where no evidentiary hearing was held were not adjudicated on the merits.

It is clear from *Harrington v. Richter, supra*, and *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004) that an evidentiary hearing is not required for a claim to be "adjudicated on the merits." In *Richter*, there was no evidentiary hearing held at the state level and the California Supreme Court denied the writ in a one sentence summary order. *Richter*, 131 S. Ct. at 783. The Supreme Court held "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Id*., at 784. It explained that where there is no explanation from the state court, "the habeas petitioner's burden still must be met by showing that there was no reasonable basis for the state court to deny relief." *Id*. Furthermore, the Ninth Circuit has specifically held that an evidentiary hearing is not required for a claim to be "adjudicated on the merits." *Lambert*, 393 F.3d at 969 ("We decline to accept Lambert's proposal to inject an 'evidentiary hearing' requirement as a pre-requisite to AEDPA deference.")

The Washington Supreme Court clearly "adjudicated on the merits" all of petitioner's PRP claims. The record before that court was voluminous and was sufficiently complete for it to decide the issues. *Id*., at 970. Elmore's disagreement with the decisions reached by the Washington Supreme Court is not a basis for this Court to conduct an evidentiary hearing given AEDPA's deference and "Congress['] wish[ ] to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under the law." *Terry Williams v. Taylor*, 529 U.S. at 386 (opinion of Stevens, J.).

III. CONCLUSION

The Court's task in deciding whether to hold an evidentiary is to "consider whether such a hearing could enable an applicant to prove the petitioner's factual allegations, which, if true, would entitle the applicant to relief." *Landrigan*, 550 U.S. at 474. Here, because Elmore merely wants the Court to listen to live testimony about what is already in the record, because *Pinholster* prohibits the Court from considering new evidence to decide if the state court's legal or factual decisions were unreasonable, and because of the deference due under AEDPA and *Strickland v. Washington*, this Court declines to hold an evidentiary hearing on Elmore's petition. The Motion for an Evidentiary Hearing [Dkt. #45] is **DENIED.**

The parties shall confer and establish a joint recommendation scheduling the further litigation of this matter. Such recommendation shall be filed with the Court within 28 days of entry of this Order. If the parties cannot agree, then individual positions shall be filed.

IT IS SO ORDERED.

The Clerk shall send uncertified copies of this order to all counsel of record, and to any party appearing pro se.

Dated this 2nd day of November, 2011.

RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE